Supreme Court, U.S.
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No. 99-1013

IN THE

Supreme Court of the United States

MICCOSUKEE TRIBE OF INDIANS OF FLORIDA, BILLY CYPRESS, JASPER NELSON, JIMMIE BERT, MAX BILLIE, HENRY BERT and DEXTER LEHTINEN,

Petitioners,

v.

TAMIAMI PARTNERS, LTD. by and through its general partner, TAMIAMI DEVELOPMENT CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

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FURTHER REASONS FOR GRANTING THE WRIT

I.

THE ELEVENTH CIRCUIT IN TAMIAMI III ERRED WHEN IT FAILED TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION.

Respondents argue that the issue of whether a private right of action for management contractors exists under the Indian Gaming Regulatory Act "IGRA" was already decided by the Eleventh Circuit panel in the second appeal (Tamiami II), Resp. at 17, and therefore, conclude that this Court should not review the issue. However, Respondents misunderstand the issue presented in the Petition for Certiorari. The issue presented is whether the Eleventh Circuit panel in the *third* appeal (Tamiami III, App. 1a), which is the subject of the Petition for Certiorari, erred by sending the case back to the district court based on the erroneous conclusion that a federal question was presented under IGRA. The issue of whether courts have *subject matter jurisdiction* where a statute on its face shows that there is no private right of action is an important issue deserving of certiorari review. The panel's decision in Tamiami III confers jurisdiction in federal court over every dispute involving gaming management contracts with Indian tribes. Because IGRA does not provide a private right of action, the Tribe should not be forced to endure litigation, even if the Tribe ultimately prevails on the merits for failure of the Plaintiff to state a claim for relief and/or a remedy under the statute.

The district court lacks subject matter jurisdiction because Respondents do not have a private right of action under IGRA and, therefore, no possible resolution of federal law is at issue. IGRA's provisions do not encompass any right of action for

management contractors and the legislative history does not explicitly, or implicitly, protect management contractors. In *Tamiami III*, the Eleventh Circuit incorrectly found that TPL had stated a federal question under IGRA. Petitioners' argument, which Respondents *failed* to address, is that *because* there is no private right of action against the Tribe under IGRA, the federal district court lacked *subject matter jurisdiction*. TPL did not allege a federal question in any of the arbitration counts in its second amended complaint; these counts are simply state court contract disputes which are improperly brought in federal court. Respondents' claims do not, under any interpretation of IGRA, turn on a construction of that statute.

Although the Eleventh Circuit's decision in this case specifically declined to address the issue of failure to state a claim, the Eleventh Circuit erred in not dismissing the case because the issue of lack of private right of action is one of subject matter jurisdiction, not just a determination on the merits, particularly where nothing on the face of the statute indicates an intent by Congress to provide a right of action in federal court. *See, e.g., Citizens State Bank of Wittenberg v. Continental Assur. Co.*, 598 F. Supp. 1111, 1112, 1115 (W.D. Wis. 1984) (no indication of private right of action, explicit or implicit; in absence of such a remedy, subject matter jurisdiction is lacking); *See also Leinwander v. Newman*, 625 F. Supp. 1269, 1270 (S.D.N.Y. 1985). Respondents fail to address the issue presented by Petitioners that the lack of a private right of action is a jurisdictional determination. (*See* Petition for Writ at 17-19). By simply ignoring the issue, Respondents cannot make it go away. The panel's decision conflicts with *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804 (1986) which stands for the proposition that a federal statute that does not create or imply a private right of action does not state a federal question. *But see Platzer v. Sloan-Kettering Institute for Cancer Research*, 787 F. Supp. 360, 364 n.5 (S.D.N.Y.), *aff'd*, 983 F.2d

1086 (Fed. Cir. 1992), *cert. denied*, 507 U.S. 1006 (1993). Petitioners submit that where the statute, as here, is clear on its face that no right of action exists against Indian tribes, dismissal for lack of subject matter jurisdiction is required. Congress simply did not intend to subject Indian tribes to suits by management contractors and a federal court cannot adjudicate TPL's claims. Respondents seek arbitration of contract disputes, and interpretation of its alleged rights under a contract, not an adjudication of any rights under IGRA. The Eleventh Circuit was incorrect in finding a federal question under IGRA because neither the statute nor its legislative history provides federal jurisdiction for a cause of action by management contractors.

Respondents' reliance on the Tenth Circuit case of *Pueblo of Santa Ana v. Kelly*, 104 F.3d 1546, 1557 (10th Cir. 1997) and the Eighth Circuit case of *Bruce H. Lien Co. v. Three Affiliated Tribes*, 93 F.3d 1412 (8th Cir. 1996) is misplaced because the chalienges in those cases were specifically to IGRA provisions. In *Pueblo of Santa Ana*, the authority of the state representative to compact, and the effect of Secretarial approval of the compact between the Tribe and the State, were the issues presented. Thus, *Pueblo of Santa Ana* presents a federal question because the question there was an interpretation of IGRA's compact provisions. Similarly, the Eighth Circuit case of *Bruce H. Lien* also involved an interpretation of IGRA and the validity of a contract under IGRA. Here, the management contractor seeks to litigate a contractual dispute which is not subject to federal jurisdiction and which does not even remotely relate to any of the provisions in IGRA. Neither *Pueblo of Santa Ana* nor *Bruce H. Lien* can be cited as precedent for federal question jurisdiction in this case. Those two cases cited by Respondents involved issues of federal question jurisdiction, this case does not.

The Supreme Court should review this case to resolve the issue of whether federal courts have subject matter jurisdiction over lawsuits filed by management contractors asserting IGRA as a basis for jurisdiction only to obtain a forum in federal court where there is no federal question presented. IGRA does not provide a private right of action to management contractors and therefore, no federal question is presented. For the reasons argued herein, and in the Tribe's Petition for Certiorari, the Petitioners request that this Court review the important issues of federal jurisdiction.

II.

THE TRIBE ONLY WAIVED IMMUNITY TO COMPEL OR ENFORCE ARBITRATION AND NOT FOR ANY CLAIMS UNDER IGRA.

Not only are there no claims under IGRA which Petitioners could properly present in federal court, but the Tribe did not waive immunity to any claims under IGRA.

The decision below misstated the rule of law because waivers of tribal sovereign immunity must be strictly construed. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). The Eleventh Circuit here incorrectly broadened the limited waiver of tribal sovereign immunity and allowed "claims" not encompassed within this limited waiver. The Eleventh Circuit panel broadened the limited waiver in Article 23 of the agreement between the Tribe at TPL, *See* App. at 4a, to include claims related to the licensing procedures under IGRA.[1] The

1. Respondents assert that the panel in Tamiami III never stated that Article 23's waiver of sovereign immunity waived claims under IGRA. Resp. 28. However, the panel in Tamiami III concluded that the waiver applied to claims which the panel (incorrectly) had decided were claims subject to federal question jurisdiction. App. 21a-23a.

waiver, however, was not that broad, *see* App. 4a, and the Eleventh Circuit panel should have dismissed the "arbitration counts" under the doctrine of tribal sovereign immunity. Respondents argue that the issue presented does not warrant certiorari because such a petition is rarely granted where the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law. Resp. at 28-29. However, the asserted error here is that the Eleventh Circuit misinterpreted Supreme Court precedent by ignoring the long-established doctrine that waivers of tribal immunity must be strictly construed. Moreover, even if the Eleventh Circuit's opinion simply misapplied a properly stated rule of law, the significance of this issue to tribal sovereignty merits review by this Court.

Respectfully submitted,

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